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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LANDY ROBERT BRIONES,

Defendant and Appellant.

B206482

(Los Angeles County  
Super. Ct. No. NA074882)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Tomson T. Ong, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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Landy Robert Briones appeals from the judgment entered upon his conviction by jury of selling or transporting cocaine base (Health & Saf. Code, § 11352, subd. (a)). Appellant admitted having suffered a prior felony conviction within the meaning of Penal Code sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d) and having served six prior prison terms within the meaning of Penal Code sections 667.5, subdivision (b). The trial court sentenced him to an aggregate state prison term of 13 years. Appellant contends that the trial court erred in permitting a forensic chemist to testify that a drug was a controlled substance based on the results of analyses conducted by another criminologist, thereby violating appellant's rights to confront and cross-examine under the Sixth Amendment of the United States Constitution, as set forth in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

We affirm.

### **FACTS**

On July 5, 2007, James Beasley (Beasley), acting as an undercover citizen agent for the Long Beach Police Department, participated in a "buy-bust" operation.<sup>1</sup> Detective Timothy Everts searched Beasley to make certain he had no drugs or money in his possession before giving him \$20 in prerecorded bills to use to purchase rock cocaine.

After making a purchase, Beasley walked away, gave a hand signal that he had completed the purchase and was picked up by Detective Joe Camrin. Beasley gave him the small, off-white, rock-like substance he received in the purchase and which appeared to be rock cocaine. Beasley went to a field showup and identified appellant as the person who sold it to him.

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<sup>1</sup> A "buy-bust" operation is one in which detectives use a citizen informant on the street to purchase narcotics. As soon as the purchase is completed and it is safe, uniformed officers assisting detectives are directed to arrest the seller. The citizen agent earns \$60 for a buy and \$20 for an attempted buy.

After the buy, Officer Caran Crawford observed appellant hand money to appellant's wife. Officer Crawford and his partner recovered the prerecorded money from her and arrested appellant.

During booking, after having been told his rights, appellant told Detective Everts that he did not use cocaine, but was an alcoholic and sold the piece of rock cocaine to Beasley in order to buy alcohol.

City of Long Beach Criminalist, Gregory Gossage (Gossage), testified. He had qualified as an expert forensic chemist dozens of times and was the custodian of records for lab analysis reports generated by the agency. As such, he prepared the record and disseminated it to people who requested it.

Gossage did not personally analyze the suspected controlled substance in this case and was not present when the tests were performed. Instead, he reviewed a report, prepared by a former Long Beach criminalist, Gregory Ryan Forte (Forte), analyzing the purchased substance. He also reviewed Forte's notes, which described the weight of the item and tests performed, and a report conducted by a fellow analyst in Forte's section, Troy Ward, reviewing the accuracy of Forte's report and notes.

When Gossage was asked about the results of the analysis, defense counsel interjected a hearsay objection that was overruled. Gossage then testified that based upon what he reviewed, in his opinion appellant sold Beasley 21 grams of cocaine base.

### **DISCUSSION**

Appellant contends that Gossage's testimony violated appellant's Sixth Amendment rights to confront and cross-examine witnesses against him. He argues that while the California Supreme Court decision in *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*) sanctioned Gossage's testimony, that case was wrongly decided and the propriety of that ruling is now pending before the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (cert. granted March 17, 2008, case No. 07-591). Appellant requests that we defer ruling on this matter until the United States Supreme Court decides the

*Melendez-Diaz* case. We decline the invitation to defer our ruling and find this contention to be without merit.<sup>2</sup>

The confrontation clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” (U.S. Const., 6th Amend.) The object of that clause is to “ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” (*Maryland v. Craig* (1990) 497 U.S. 836, 845.)

In *Crawford*, the United States Supreme Court overruled *Ohio v. Roberts* (1980) 448 U.S. 56, which had allowed out-of-court statements to be admitted at trial upon a showing of sufficient indicia of reliability. (*Crawford, supra*, 541 U.S. at pp. 60-67.) The Supreme Court concluded that with regard to nontestimonial hearsay, the *Roberts* approach was acceptable; such statements remain subject to state hearsay law and may be exempted from confrontation clause scrutiny entirely. (*Crawford, supra*, at p. 68.) But where testimonial evidence is involved, “the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination.”<sup>3</sup> (*Ibid.*)

While the Supreme Court left for another day any effort to spell out a comprehensive definition of “‘testimonial’” (*Crawford, supra*, 541 U.S. at p. 68), it stated that it includes “‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’” (*Id.* at p. 52.) The court stated that “at a minimum” the term “testimonial” applies “to police interrogations.” (*Id.* at p. 68.)

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<sup>2</sup> We agree with appellant that he has not forfeited this contention, as it would have been futile to have raised it in the trial court in light of *Geier, supra*, 41 Cal.4th 555. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4.)

<sup>3</sup> *Crawford* left open the question of whether the confrontation clause had any application to nontestimonial hearsay. (See *Crawford, supra*, 541 U.S. at p. 61.)

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the Supreme Court elaborated on what constitutes testimonial statements. (*Id.* at p. 822) There, the trial court admitted in evidence a recording of the statements made by a domestic violence victim in response to a 911 telephone operator's questions regarding what had occurred during a domestic violence incident that was the subject of the call, including circumstances at the house at the time of the call, the identity of the perpetrator, what he was doing, why he was at the house, whether he was armed, and a description of the assault. (*Id.* at pp. 817-818.) Answering the question left open in *Crawford*, the Supreme Court concluded that the confrontation clause applied only to testimonial hearsay. (*Davis, supra*, at pp. 824-825) The Court was therefore required to determine if the victim's statements in the 911 call were testimonial.

In making that determination, the Supreme Court held that, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis, supra*, 541 U.S. at p. 822.) Interrogations "solely directed at establishing the facts of a past crime, in order to identify (or produce evidence to convict) the perpetrator" are clearly testimonial, "whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer." (*Id.* at p. 826.) Interrogation during a 911 call is not testimonial because it is not designed primarily to establish or prove some past fact but to describe current circumstances requiring police assistance.

In *Geier, supra*, 41 Cal.4th 555, the prosecutor's DNA expert, Dr. Robin Cotton (Cotton), testified that the defendant's DNA matched that taken from a rape victim. Cotton was the laboratory director for a private company that performs DNA testing for both the prosecution and the defense and was accredited by the American Society of Crime Laboratory Directors. She held a B.S. and M.S. in biology and a Ph.D. in

molecular biology and biochemistry. As the lab director, she oversaw testing and supervised the six analysts who conducted the testing. She had testified as a DNA expert in approximately 20 trials. (*Id.* at pp. 593-594.) The defendant objected to Cotton's DNA analysis that resulted in the match with the defendant's DNA because Cotton "“didn't actually run the tests herself.”" (*Id.* at p. 596.) The trial court stated that the results were a business record and that even if they were hearsay, Cotton could rely on them for purpose of formulating her opinion as a DNA expert. (*Ibid.*)

On appeal, the defendant argued that the DNA report that was the basis of Cotton's testimony was testimonial hearsay because it was a statement "“made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”"” (*Geier, supra*, 41 Cal.4th at p. 598.) The California Supreme Court held that the DNA report was not testimonial for purposes of *Crawford* because the observations contained in the report analyzing the substance were "contemporaneous recordation of observable events rather than the documentation of past events." (*Geier, supra*, 41 Cal.4th at p. 605.)

*Geier* is controlling here, and we are bound to abide by it. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) Hence, the trial court did not err in admitting Gossage's testimony.

**DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, P. J.  
BOREN

We concur:

\_\_\_\_\_, J.  
ASHMANN-GERST

\_\_\_\_\_, J.  
CHAVEZ